BEFORE THE JUDICIAL QUALIFICATIONS COMMISSION
STATE OF FLORIDA

INQUIRY CONCERNING JUDGE
HOWARD C. BERMAN, JQC NO.
00-211 CASE NO. SC00-2491
_____/

MOTION IN LIMINE TO PROHIBIT EVIDENCE OF RUMORS OR ACTIONS TAKEN BASED ON RUMORS

JUDGE HOWARD BERMAN (hereinafter "Judge Berman") moves the Court for an Order excluding any questioning, evidence, or commentary with regard to the following matters:

1. Two of the proposed JQC witnesses, Kenneth J. Selvig and Theodore Booras, are expected to be asked questions related to actions they have taken in their offices based on rumors regarding Judge Berman.

2. Kenneth Selvig is an Assistant State Attorney and has been since 1975. From 1993 through 1997, he was in charge of assigning lawyers to felony divisions. This responsibility included assigning lawyers to Judge Berman's division. On his deposition, he testified that his decisions were influenced by the gender of the lawyer assigned to Judge Berman's division:

> "A. In general, again without being specific, it was a consideration whether or not the attorney, an attorney that was available, was young, female and attractive, and as a general rule, unless there was – that wouldn't be a determining factor, but that was a factor, and generally speaking, we would try not to assign attorneys who fit in that category to his division.
>
> Q. And why was that?

A. Because there was a perception in the office that attorneys that fell into that category were treated differently, and that was simply if we could avoid creating that as a factor, we would do so.

Q. Can you be more specific about how the perception in the office was that a young, attractive female was treated differently?

A. The perception was that Judge Berman frequently would express personal interest in attorneys that fell into that category, and that the personal interest may at times influence the way he handled cases.

Q. Was this based on rumor or was it based on specific interviews with specific people.

A. No, well, as between the two, it was more leaning toward rumor than specific instances. There were one or two anecdotal instances that I certainly can't vouch for personally, I don't have any personal knowledge of, but it was – again, it wasn't the only factor, but it was a factor that from our view, from my view, it was simply an issue that if it could be avoided without otherwise complicating assignments, that it would be avoided.

Q. You've already indicated that you thought Judge Berman and think Judge Berman is a good judge, and thought that at the time, I presume?

A. Yes.

Q. Was there ever any time that this perception, to your personal knowledge, affected Judge Berman's ability to serve as a good and effective judge?

A. Certainly not to my personal knowledge, no.

Q. How about rumor?

A. The only way I can answer that is to say that I have a general recollection that there were, but if you ask me to give you specifics, I couldn't.

Q. Okay. But I have to make this clear on this record because I don't want to look at the record later and wish I had asked more questions. As I understand it, you have no personal knowledge of any specific incident that would have caused this perception to exist. Is that correct?

A. That's correct."

3. The deposition of Ted Booras, an Assistant State Attorney, was taken on August 28, 2001. His testimony was similar to that of Selvig. He had no personal knowledge of any complaints against Judge Berman at the time discussions of assignments to Judge Berman's division took place. Therefore, any statements made by others in those staffing meetings were hearsay.

4. Testimony from any of these two witnesses with regard to rumors that they heard in the State's Attorneys' Office or statements made to them by unidentified persons when neither the identity of the person nor the specific substance of the statement can be identified is worse than hearsay. There is no purpose for offering such statements other than an effort to suggest that such testimony buttresses the proposition that Judge Berman, in fact, did act inappropriately toward women prosecutors. The only purpose for offering such clearly inadmissible testimony, which has no probative value, would be to further embarrass Judge Berman.

5. More importantly, however, the implication from allowing the prosecutors to testify that they took specific actions based upon rumors or statements from unidentified persons is that a non-testifying witness has made an out-of-court statement which tends to prove Judge Berman's guilt. This should not be admissible. That is, these attorneys should not be allowed to testify with regard to actions they took based upon rumors, hearsay, statements from usually unidentified persons with unidentified content.

6. The cases in Florida dealing with these issues are collected in Schaffer v. State, 769 So. 2d 496 (4 DCA Fla. 2000). In this case, the defendant had been convicted of possession of cocaine with intent to deliver. The Appellate Court reversed because the

trial court admitted prejudicial hearsay. One of the police officers involved testified that he had been working with a confidential informant who provided information to him. The contents of the conversation was held not admissible by the trial court, but the trial court then allowed the officer to testify with regard to the actions that he took based upon the unidentified information that he received. In reversing, the Appellate Court stated:

> "This was all impermissible; the evidence was inadmissible hearsay. Where the implication from in-court testimony is that a non-testifying witness has made an out-of-court statement offered to prove the defendant's guilt, the testimony is not admissible. In Collins v. State, 65 So. 2d 61 (Fla. 1953), the court had appeared to allow an officer to testify as to what he did as a result of information received from another, but would not permit the officer to state the information so received unless it otherwise met a recognized hearsay exception. Several years later in State v. Baird, 572 So. 2d 904 (Fla. 1990), the court explained that Collins had predated the Florida Evidence Code and that such hearsay was inadmissible."

The Appellate Court analyzed what had happened at the trial below:

> "* * *The officers first set the stage by testifying as to police procedures for 'buy-bust' sting operations. Then over objections, the court permitted the officers to state that, after speaking with the CI, they drove to a parking lot, waited specifically for defendant in his specific car, and arrested him upon his arrival. The inescapable implication of this testimony is that the CI told the police that he had set up a buy-bust transaction with defendant, who had agreed to sell cocaine to the CI. The testimony of the officers was offered to prove the matter asserted by the declaration, namely that defendant had agreed to sell cocaine to the CI.
>
> Because the CI did not testify at trial, he could not be cross-examined. Defendant was thus denied the opportunity to challenge the CI's credibility before the jury. His right to confront his accusers was thereby improperly abridged." (Citations omitted).

7. These cases are directly analogous to the testimony of Messrs. Selvig and Booras. Such testimony should be excluded.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facsimile and U.S. Mail to the persons on the attached Service List this 6th day of September, 2001.

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Before the Florida Judicial Qualifications Commission
Supreme Court Case No. SC 002491
Inquiry Concerning a Judge, No. 00-211

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